

Editor's note: 94 I.D. 181; Appealed -- reversed, Civ.No. 3-87-437 (E.D. Tenn. June 6, 1989), appeal filed, No. 89-6000 (6th Cir., Aug. 4, 1989); voluntarily dismissed, (Nov. 17, 1989)

BERNOS COAL CO.
AND
EXCELLO LAND AND MINERAL CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT

IBLA 85-845

Decided May 18, 1987

Petitions for discretionary review of a decision by Administrative Law Judge David Torbett sustaining Cessation Order No. 81-2-75-22 against both Bernos Coal Company and Excello Land and Mineral Corporation, and assessing a civil penalty in the amount of \$ 22,500 against Bernos Coal Company only.

Affirmed as modified in part; affirmed in part; vacated in part; Petition for Discretionary Review filed by the Office of Surface Mining Reclamation and Enforcement dismissed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally -- Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the state regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the state agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor,

since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally -- Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

4. Administrative Procedure: Administrative Law Judges -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

APPEARANCES: Joseph N. Clark, Jr., Esq., Knoxville, Tennessee, for petitioners; R. Anthony Welch, Esq., Office of the Field Solicitor, Knoxville, Tennessee, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

In a decision dated July 26, 1985, Administrative Law Judge David Torbett ruled that the Office of Surface Mining Reclamation and Enforcement (OSM) properly issued Cessation Order (CO) No. 81-2-75-22 to both Bernos Coal Company (Bernos) and Excello Land and Mineral Corporation (Excello) (herein referred to together as "petitioners"), but that the \$ 22,500 civil penalty assessment should be imposed against Bernos only. Both Bernos and Excello have sought discretionary review of Judge Torbett's holding that OSM properly issued the CO and the underlying notice of violation (NOV), and OSM sought discretionary review of his ruling that the civil penalty should be assessed against Bernos only. The Board granted the petitions by order dated September 12, 1985.

Procedural Background

The Tennessee Division of Surface Mining and Reclamation (TDSM) issued permit No. 78-148 to Bernos on June 23, 1978. The land embraced by the permit had been previously mined. Excello was a contract miner for Bernos, with the right to extract coal from the site, and was responsible for all reclamation work on the site. Excello mined the property in late 1978 and early 1979.

On January 19, 1981, OSM Inspector Douglas Godesky issued NOV No. 81-275-4 to Bernos for seven violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), and the regulations promulgated thereto. On March 6, 1981, OSM amended the NOV to add Excello as the operator and to extend the time for abatement. On March 20, 1981, OSM issued CO No. 81-2-75-10 to Bernos and Excello for failure to abate the violations cited in the NOV. As a result of an informal hearing, the NOV was modified to extend the period for abatement, and the CO was vacated. On June 16, 1981, Inspector Godesky again inspected the site, and upon discovering that violation No. 6 of NOV No. 81-2-75-4 had not been abated, he issued CO No. 81-2-75-22. Violation No. 6 was for "failure to establish final graded slopes which do not exceed the approximate premining slopes and for failure to backfill and grade to the most moderate slope possible."

Applicants filed a joint application for review of CO No. 81-2-75-22 on July 17, 1981. On December 11, 1981, OSM issued a notice of proposed penalty assessment of \$ 22,500 for the CO, and after completion of an assessment conference on February 24, 1982, OSM issued an assessment conference report affirming the assessment. On January 6, 1983, Bernos and Excello filed a petition for review of the assessment under 43 CFR 4.1150. Contemporaneous with the filing of this document, petitioners paid the amount of the disputed penalty into escrow pending final determination. In addition, on the same date, petitioners filed a motion to dismiss the assessment, alleging a failure by OSM to comply with certain deadlines for issuing assessments.

The application for review and the petition for review were consolidated for consideration by the Hearings Division. Following a hearing, on July 26,

1985, Judge Torbett issued his decision holding that the CO was validly issued to both Bernos and Excello. However, he also ruled that the civil penalty of \$ 22,500 should be assessed against Bernos only, and that no civil penalty should be assessed against Excello.

Petitioners challenge Judge Torbett's decision on three bases. First they argue that even if the underlying NOV were validly issued, "the doctrines of res judicata and/or collateral estoppel bar [OSM] from instituting further proceedings to enforce the corrective actions required in the subject NOV and CO" (Petitioners' Brief at 12). In making this argument, they invoke the disposition by the Tennessee Board of Reclamation (Tennessee Board) of two NOV's issued by TDSM in October and November 1983 for the minesite involved herein. One of the State NOV's, No. 014-09-83, was issued, inter alia, for failure to regrade to stabilize rills and gullies. The Tennessee Board vacated that violation, and subsequently issued an order declaring that "[t]he area permitted under Permit No. 78-148 is considered reclaimed and the bond securing reclamation under Permit No. 78-148 is hereby released." Judge Torbett ruled, for reasons discussed infra, that if the doctrines of res judicata and/or collateral estoppel were applicable in the context of SMCRA enforcement, the prerequisites for their application were absent in this specific case.

Second, petitioners assert that Judge Torbett improperly ruled that OSM carried its ultimate burden of persuasion as to the fact of the violation and as to the amount of the civil penalty, as required under 43 CFR 4.1155. Petitioners assert that they "conducted very limited coal extraction activities in the southeastern portion of the permit area in the vicinity where cross

section B-B' * * * intersected the old east-west highwall" (Petitioners' Brief at 2). They state that they not only backgraded and reclaimed the B-B' section as marked on the permit map, but also that they "backgraded and initially reclaimed other areas which had been left by the previous operators, but upon which Excello had conducted no coal extraction activities." Id. at 3. In the process, Excello claims it eliminated "the old east-west highwall." In sum, according to petitioners, /Excello's mining and reclamation activities had "no 'adverse physical impact' whatsoever on the old slopes, but, rather, had a beneficial impact on them." Id. at 3. Petitioners argue that Judge Torbett erred to the extent he "appears to have ruled that by initiating mining activities on a limited basis in the southeastern portion of the permit area, the applicants have become responsible for all of the permit area." Id. at 8 (emphasis in original). They assert that under Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979), since their operations had no adverse physical impact "upon a condition at the site caused by previous mining, [they] cannot be required to correct the condition resulting from the previous mining" (Petitioners' Brief at 11). "Thus, since no coal extracting or other mining related activities took place in the area of the remaining slopes in question, and, further, since the other slopes were only beneficially, rather than adversely, affected, the subject NOV and CO should be vacated." Id. at 12.

Petitioners' third argument is that Judge Torbett should have granted their motion to dismiss because they were prejudiced by OSM's failure to issue a notice of proposed penalty assessment until some 6 months after the CO was written. They maintain that OSM should have served a copy of the proposed assessment within 30 days of issuance of the NOV or CO in accordance

with 30 CFR 723.17(b). Judge Torbett found that they made a timely request for an assessment conference, but before it was held, a fire consumed Excello's offices in Grundy, Virginia, destroying maps, photographs, and other documents which petitioners claim were vital to their defense. Judge Torbett ruled that under Badger Coal Co., 2 IBSMA 147, 87 I.D. 319 (1980), petitioners did not show actual prejudice, since the question of whether the violation had occurred was resolved on the basis of the permit application submitted by Bernos.

OSM's petition for discretionary review took exception with Judge Torbett's ruling that the civil penalty of \$ 22,500 should not be assessed against Excello, but against Bernos only. Judge Torbett ruled that under section 518(f) of SMCRA, 30 U.S.C. § 1268(f) (1982), as Bernos' agent, Excello must have acted "willfully and knowingly" in order to be subject to the civil penalty. He concluded that there was insufficient evidence "to make a factual finding that Excello intentionally and consciously committed the violations in question" (ALJ Decision at 8). OSM maintains that Excello, as an "operator," failed to correct a violation, and is subject to civil penalties under section 518(h) of SMCRA, 30 U.S.C. § 1268(h) (1982). Thus, OSM concludes that whether Excello was Bernos' agent is irrelevant.

Discussion

Petitioners argue that collateral estoppel and/or res judicata bar efforts by OSM to enforce the corrective action required in the NOV and CO. They base this argument upon the fact that the Tennessee Board entered a final order resolving ^{97BBLA 291} ~~HB 1029~~ challenge to the State-issued NOV's, which

declared that "[t]he area permitted under Permit No. 78-148 is considered reclaimed and the bond securing reclamation under Permit No. 78-148 is hereby released."

In his decision, Judge Torbett noted that in Excello Coal Corp. v. Clark, No. Civ-3-84-902 (E.D. Tenn. Dec. 28, 1984) (hereinafter Excello v. Clark), the court addressed the same legal question in the context of related facts. At issue in Excello v. Clark was an NOV issued by OSM on July 20, 1984, which cited Excello for a violation of Tennessee regulation 0400-1-14-61, 1/ charging that there was a "failure to prevent formation of rills and gullies deeper than nine (9) inches in regraded and top soil area" (Memorandum Opinion at 3). This was the same violation for which the State had found a State NOV to have been improperly issued. Excello sought judicial review of an October 22, 1984, decision of Judge Torbett denying temporary relief from the NOV issued by OSM. The parties consented to have the case decided by a United States Magistrate under 28 U.S.C. § 636(c) (1982). The Magistrate phrased the issue as follows: "Whether the state agency decision that the state 'rill and gully' NOV was improperly issued precludes the OSM, under the

1/ On Aug. 3, 1982, the Department granted conditional approval of Tennessee's permanent regulatory surface mining program, effective Aug. 10, 1982, pursuant to section 503 of SMCRA, 30 U.S.C. § 1253 (1982). 47 FR 34724, 34753 (Aug. 10, 1982). However, Tennessee subsequently failed to indicate to OSM's satisfaction its intent and capability to implement, maintain, and enforce its regulatory program. Consequently, on Apr. 5, 1984, the Department assumed direct Federal enforcement of the inspection and enforcement portions of the State's program pursuant to 30 CFR 733.12. 49 FR 15496 (Apr. 18, 1984). The Department withdrew approval of the State's permanent regulatory program in full, effective Oct. 1, 1984. As of that date, OSM began enforcing the provisions of the permanent program performance standards set forth in 30 CFR Part 816 that replaced those repealed effective the same date by the State. 30 CFR 942.816(a) (49 FR 38874, 38895 (Oct. 1, 1984)).

doctrine of collateral estoppel, from issuing its own NOV later for the same violation" (Memorandum Opinion at 4).

The Magistrate rejected OSM's argument that the traditional principles of res judicata and collateral estoppel do not apply to OSM's enforcement actions, and that even if those principles did apply, the requisite privity did not exist between OSM and TDSM. The Magistrate's statement of the doctrines of res judicata and collateral estoppel and their application in the administrative context is quoted below:

Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, the determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5 (1979). It is now accepted that both res judicata and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity. United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966). In the absence of "countervailing statutory policy," collateral estoppel applies and bars relitigation of factual questions or mixed questions of law and fact. See Brown v. Felsen, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10 (1979); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

(Memorandum Opinion at 5-6).

The Magistrate reviewed SMCRA and its legislative history, particularly the provisions concerning the permanent regulatory program and OSM's oversight responsibility in primacy states, to conclude that there is no "countervailing statutory policy" embodied therein which would deny application of

collateral estoppel and res judicata principles. He relied upon United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980), in which the Ninth Circuit ruled that the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1982), did not abrogate principles of res judicata and collateral estoppel. Under section 402 of FWPCA, 33 U.S.C. § 1342 (1982), a state agency, pursuant to an approved state program, may issue water pollution discharge permits. In ITT Rayonier, the State agency issued a compliance order against Rayonier after the United States Environmental Protection Agency (EPA) advised the State agency that if it did not take action, Rayonier would be a "candidate" for Federal enforcement. Rayonier successfully litigated the validity of the State compliance order in State proceedings. In March 1977, the EPA issued a notice of violation to Rayonier and the State agency pursuant to FWPCA, and in April 1977, EPA filed an enforcement action in Federal district court. The court ordered Rayonier to comply immediately with the permit. Rayonier appealed the district court ruling, arguing before the Ninth Circuit that the State judgment operated to preclude EPA's action.

The ITT Rayonier court noted the "dual" or "concurrent" enforcement authority under FWPCA. 627 F.2d at 1001. The fact that "[e]nforcement actions could have been filed concurrently in both state and federal courts * * * does not necessarily preclude the operation of collateral estoppel after one action reaches finality." Id. "[S]tate and federal enforcement actions under FWPCA are based on permits issued under a single system. The EPA retains authority to veto state-issued permits * * *. Further, it may revoke the permit issuing authority of the state agency." Id. at 1002. Moreover, "[a]lthough the NPDES [National Pollution Discharge Elimination System]

state permit program is established under the state law and functions 'in lieu' of federal authority, the source of the federal/state 'partnership' can be traced to a single act of Congress (FWPCA)." Id. The Ninth Circuit concluded that FWPCA does not manifest a countervailing policy reason to abrogate the doctrine of res judicata.

It further ruled that the relationship between the State and EPA was such as to preclude relitigation of the issue resolved in the State court. The basis for that ruling was the court's conclusion that a nonparty may be bound if it "is so closely aligned with its interests as to be its 'virtual representative'" and its findings that

[t]he interests of [the Washington Department of Energy] and the EPA were identical and their involvement sufficiently similar. * * * It is undisputed that [the Washington Department of Energy] maintained the same position as the EPA before the state hearings board and state courts. * * * The EPA does not contend that [the Washington Department of Energy] failed to assert vigorously its position in the state proceedings.

Id. at 1003.

In Excello v. Clark, the Federal Magistrate rejected OSM's argument that the legislative scheme embodied in SMCRA evinces the intent to preclude res judicata and collateral estoppel. He stated:

The fact that § 1271 gives the OSM authority to step in and take over the enforcement of a state program does not give it the authority to reopen enforcement decisions of the state agency which had already become final. Such an interpretation would allow the OSM to take over State programs and bring enforcement actions against mine operators for an unlimited time after the

controlling state agency had found a mine to be sufficiently reclaimed. The undersigned is reluctant to recognize such an unlikely legislative intent without any clear evidence of it.

(Memorandum Opinion at 9). He conceded "that the relationship between the EPA and its corresponding state agencies is different from the relationship between the OSM and its corresponding state agencies. However, for purpose of collateral estoppel this appears to be a distinction without a difference" (Memorandum Opinion at 10). He concluded that the "dual" or "concurrent" enforcement scheme established under FWPCA is analogous to that established under SMCRA. "[T]he Tennessee DSM and the OSM were applying the identical state created and Federally approved guidelines to the appellant's mine site" (Id. at 11).

In applying the ITT Rayonier tests, the Magistrate concluded that the operative facts giving rise to the State-issued NOV and that issued by OSM were the same, and that the issue was actually and finally litigated in the State proceeding. "Of the prerequisites to the application of collateral estoppel only the identity of the parties is a challenged issue. The Secretary claims that he was neither a party nor privy to the state enforcement action" (Memorandum Opinion at 12). The Magistrate found as follows on this question:

[T]he interests of the DSM and OSM were so similar in this case that the OSM was a privy to the state enforcement action. Both agencies were participating in the same federal program, enforcing the same state environmental protection objectives. The OSM could have participated in the state enforcement action if it had desired. That DSM was OSM's "virtual representa-tive" is evident by the fact that it stepped in and began operating exactly the

same program that DSM had operated. The relationship between DSM and OSM is sufficiently close to preclude relitigation of the issue already determined in the DSM enforcement action.

(Memorandum Opinion at 12-13).

[1] Our analysis of the applicability of res judicata/collateral estoppel principles in this case leads to the conclusion, contrary to Excello v. Clark, that the unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders those doctrines inapplicable to issues arising in the Federal/State context. ^{2/} That policy is placed into focus by examining OSM's responsibilities, as defined in key provisions of SMCRA and its legislative history, as well as the regulations promulgated to implement SMCRA. OSM, on behalf of the Secretary, is required to ensure compliance with the law regardless of the actions or inactions of the State regulatory authority.

The interim regulations provide that "[t]he States are responsible for issuing permits and inspection and enforcement on lands on which operations are regulated by a State to insure compliance with the initial performance standards * * *." 30 CFR 710.4. However, 30 CFR 710.3 directs the Secretary

^{2/} In Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984), in expressly declining to follow the decision of the U.S. District Court for Alaska in Oregon Portland Cement Co. v. United States Department of the Interior, 590 F. Supp. 52 (D. Alaska 1984), the Board stated:

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain."

We respectfully decline to follow Excello v. Clark for those same reasons.

to "implement an initial regulatory program within six months after the date of enactment of the Act in each State which regulates any aspect of surface coal mining under one or more State laws until a State program has been approved or until a Federal program has been implemented." As part of this implementation responsibility, 30 CFR Part 721 requires the Secretary to "conduct inspections of surface coal mining and reclamation operations subject to regulation under the Act." See 30 CFR 721.11. When the Secretary discovers a violation of SMCRA during the interim program, both section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1982), and 30 CFR 722.12 require the issuance of an NOV. If the permittee fails to abate the violation in accordance with the time period specified in the NOV, OSM is required to issue a CO pursuant to section 521(a)(3) and 30 CFR 722.13. In turn, section 518(a) and (h) of SMCRA, 30 U.S.C. § 1268(a) and (h) (1982), mandates the imposition of civil penalties for the issuance of a CO issued under section 521(a)(3).

Congress specifically recognized the need for efficient enforcement under both the interim and permanent regulatory programs. The House specified the reasons:

Efficient enforcement is central to the success for the surface mining control program contemplated by H.R. 2. For a number of predictable reasons -- including insufficient funding and the tendency for State agencies to be protective of local industry -- State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment. The committee believes, however, that the implementation of minimal federal standards, the availability of federal funds, and the assistance of the expertise of the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the act.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 129 (1977). During the interim program, "the Secretary's responsibility relates to the enforcement of Federal interim performance standards which are implemented during the interim period. It is the Secretary's duty to respond to any reasonable evidence of violations of those Federal standards by using the authority vested in him to bring about compliance." Id. at 132 (emphasis added).

The Department has ruled that the Secretary's duty during the interim program is not diminished by the fact of possible dual enforcement action by OSM and a state. In Kaiser Steel Corp., 2 IBSMA 158, 87 I.D. 324 (1980), the Board of Surface Mining and Reclamation Appeals stated at 2 IBSMA 162, 87 I.D. at 326: "OSM is required by 30 CFR 722.12(a) to issue a notice of violation during the initial regulatory program when a violation is discovered. This power is in addition to state enforcement powers." (Emphasis added.) Accord Rayle Coal Co., 3 IBSMA 111, 88 I.D. 492 (1981); Eastover Mining Co., 2 IBSMA 5, 87 I.D. 9 (1980).

The Senate was also adamant about a strong Federal presence and enforcement role in a primacy state:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977).

The legislative history, when read in conjunction with section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), which provides for Federal inspection and enforcement in states with primacy, requires the conclusion that a countervailing statutory policy warrants an exception to the preclusion doctrines. The applicability of those rules would be inconsistent with the statutory scheme set forth in section 521(a)(1). Under that section, when OSM inspects a surface coal mining operation located in a primacy state and discovers a violation, OSM must give notice to the state regulatory authority. See 30 CFR 843.12(a)(2). Whether OSM need take further action depends upon whether the state's response constitutes appropriate action. OSM determines whether the action taken is appropriate; such action must be calculated to secure abatement of the violation. Peabody Coal Co. v. OSM, 95 IBLA 204, 94 I.D. 12 (1987); Turner Brothers, Inc. v. OSM, 92 IBLA 23, 93 I.D. 199 (1986).

If, under section 521(a)(1), OSM issued a 10-day notice to the state informing the state of a violation at a particular minesite and the state's response was that an NOV had been issued for that violation, and that the violation had been challenged and subsequently vacated in State proceedings, OSM would not be precluded from taking further enforcement action. In fact, the regulations provide that "if the violation continues to exist, [OSM] shall issue a notice of violation or cessation order, as appropriate." 30 CFR 843.12(a)(2) (Emphasis added).

Application of collateral estoppel and res judicata principles is inconsistent with OSM's enforcement responsibility during the interim and permanent regulatory periods. The availability of the rules of preclusion to permittees

as a defense to OSM enforcement action during either period would divest OSM of the authority expressly conferred by Congress.

Even if there were no "countervailing statutory policy" in SMCRA, the preclusion doctrines would not apply in this case because the prerequisites for their application, as announced in ITT Rayonier, are missing. First, the same issue is not involved. As Judge Torbett stated in his decision:

One of the principles of res judicata and collateral estoppel is that the "question expressly and definitely presented in this suit must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation." United States v. Moser, 266 U.S. 236, 242 (1924); Montana v. United States, 440 U.S. 147, 157 (1979). In this case, the Applicants/Petitioners were issued a violation for "failure to establish final grade slopes which do not exceed the approximate premining slopes and for failure to backfill and grade to the most moderate slope possible." This violation was not "definitely and actually litigated and adjudged adversely to the Government in the previous litigation." The State Board received no evidence on this violation. It was not litigated before them. The fact that the Board found the site fully reclaimed does not mean that all possible violations were litigated before them. Thus, the undersigned finds that the subject cessation order cannot be vacated on the grounds of res judicata and/or collateral estoppel.

(ALJ Decision at 3). We reject petitioners' argument that the Tennessee Board's "finding of full reclamation concerning a site is, of necessity, a finding that no violations exist" (Petitioners' Brief at 13). The issue of whether petitioners had met the requirements of 30 CFR 715.14 was not before the Tennessee Board. Moreover, in OSM v. Calvert & Marsh Coal Co., 95 IBLA 182, 189 (1987), the Board held that release of a performance bond by the

state regulatory authority does not affect OSM's authority to enforce the Act. See Grafton Coal Co., 3 IBSMA 175, 88 I.D. 613 (1981).

Second, there is no privity between the State and OSM. TDSM was not OSM's virtual representative during the State proceeding, so that OSM was a "privy" to that action. ^{3/} In United States v. Mendoza, 464 U.S. 154 (1984), the United States Supreme Court reaffirmed its analysis in Montana v. United States, 440 U.S. 147 (1979), which established the degree of mutuality required of the Federal Government as a party litigant in the prior litigation, stating:

In Montana an individual contractor brought an initial action to challenge Montana's gross receipts tax in state court, and the Federal Government brought a second action in federal court raising the same challenge. The Government totally controlled and financed the state court action; thus for all practical purposes, there was a mutuality of parties in the two cases. "[T]he United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation," 440 U.S., at 155, to be constituted a "party" in all but a technical sense.

464 U.S. at 164 n.9. We agree with OSM that "the Secretary had no 'laboring oar' in the conduct of [TDSM's] administrative litigation. The Secretary cannot in any sense be termed a 'party' to the proceedings before the Tennessee Board of Reclamation Review" (OSM Brief before Judge Torbett at 28).

^{3/} Petitioners argued before Judge Torbett, and now argue to this Board, that Westwood Chemical Co. v. Kulick, 656 F.2d 1224 (6th Cir. 1981), renders irrelevant the fact that Judge Torbett acquired jurisdiction over the matter involved herein before Tennessee began its enforcement action against petitioners. Given our conclusion regarding the statutory policy of SMCRA and the inapplicability of res judicata and collateral estoppel principles in this case, the sequence in which jurisdiction was acquired is not decisive.

For the above-stated reasons, we conclude that principles of res judicata and collateral estoppel do not bar OSM's enforcement action in this case.

[2] Permit No. 78-148 was issued to Bernos on June 23, 1978, and, thus, was required to "contain terms that comply with the relevant performance standards of the initial regulatory program." 30 CFR 710.11(a)(3)(i) and (ii). See section 502(b) and (c) of SMCRA, 30 U.S.C. § 1252(b) and (c) (1982). A general performance obligation under the initial regulatory program, applicable to all surface coal mining and reclamation operations, was to "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated." Section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1982). The Department's initial program regulations include 30 CFR 715.14, which was adopted to implement section 515(b)(3) of SMCRA. This regulation, cited by OSM as authority for issuance of the NOV and CO in this case, provides in pertinent part:

In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. * * * The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a).

(a) Slope measurements. (1) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the regulatory authority in accordance with site conditions, must be accurately measured and recorded. * * * Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the regulatory authority to be representative of the premining configuration of the land. * * *

* * * * *

(b) Final graded slopes. (1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (a)(1) and approved by the regulatory authority or any lesser slope specified by the regulatory authority based on consideration of soil, climate, or other characteristics of the surrounding area. [Emphasis added.]

The permit package prepared by Bernos and submitted to and approved by the State of Tennessee indicated the premining slopes in accordance with 30 CFR 715.14(a)(1). Those slopes ranged from 12 to 15 degrees (Tr. 15-16, 69-70; Exh. R-43). The package also shows, in accordance with 30 CFR 715.14(b), final graded slopes of 15 degrees (Tr. 102-04; Exh. R-46). 4/

OSM through its witnesses presented extensive testimony before Judge Torbett concerning whether petitioners violated 30 CFR 715.14 and the conditions of the permit based thereon. Judge Torbett's summary of this testimony is as follows:

Inspector Godesky testified on behalf of the Respondent and introduced photographs in support of his testimony. He testified that the southern end of the permitted area had slopes of 28 and 29 degrees based on measurements that he made with a Brunton compass (Tr. 19-24). Mr. Roland Harper, an expert surveyor, testified on behalf of the Respondent. His survey shows that the southern outcrops on subject site contain slopes that reach 26 degrees. The survey also shows negative slopes on the southern end of the permitted area.

The Respondent contends that the Applicants/Petitioners violated a condition of their permit. The permit map has two

4/ 30 CFR 715.14(b)(1) provides that the requirements of that paragraph may be modified by the regulatory authority where the mining is re-affecting previously mined lands that have not been returned to approximate original contour and sufficient spoil is not available to return to the slope determined according to paragraph (a)(1). There is no evidence Bernos sought such a modification of its performance obligations.

cross sections. The cross section marked B-B' is at issue in this case. The permit map requires the Applicants/Petitioners to return cross section B-B' to a 15 degree average slope with no negative slopes (Ex. R-43, R-46, A-3). The Applicants/Petitioners maintain that the permit map only requires that they return this particular cross section to a 15 degree average slope. The Respondent maintains that cross section B-B' is representative of an area on the subject site which includes the southern end of the permitted area. Thus, Respondent contends that cross section B-B' requires the Applicants/Petitioners to regrade the southern end of the permitted area to conform with this cross section.

* * * * *

In order to comply with [30 CFR 715.14], the regulatory authority and the Applicants/Petitioners must have found that cross section B-B' was a "sufficient slope to adequately represent the land surface configuration." Thus, the permit requires not only that cross section B-B' be regraded to a 15 degree average slope with no negative slopes but also that all other slopes that cross section B-B' represents be regraded to a 15 degree average slope with no negative slope. The only other slope given by the Applicants/Petitioners is cross section A-A', and this cross section runs east to west. [5/] Since cross section B-B' runs north to south, it is clear that cross section B-B' covers the southern end of the permitted area.

The evidence of the Respondent shows that the southern outcrops of the subject site reach 26 degrees. The site then slopes downward for 100 to 120 lateral feet before it starts to rise to the crown of the site at angles that reach 18 degrees (Ex. R-47). This land configuration does not conform to the proposed slope in the Applicants/Petitioners' permit. The undersigned concludes that the Applicants/Petitioners violated a condition of their permit. This conclusion is sufficient to find that the violation underlying the subject cessation order occurred.

(ALJ Decision at 5-6). Our review of the evidence in this case establishes the correctness of Judge Torbett's findings and his ruling.

5/ Section B-B' of Drawing No. 77-135-1 D (Exh. R-43) is the only cross-section relevant to the site in question. Section A-A' is a cross-sectional drawing for another site located north of the one in question.

Petitioners challenge Judge Torbett's ruling on the basis of Cedar Coal, *supra*, in which OSM had issued an NOV to Cedar for failure to eliminate completely an orphaned highwall in violation of 30 CFR 715.14(b)(1)(ii). The Board ruled that "[t]here has been no showing that Cedar's removal of overburden has resulted in any adverse physical impact on the orphaned highwall. Thus, we conclude that this activity has not triggered any obligation on the part of Cedar to eliminate the orphaned highwall." 1 IBSMA at 155, 86 I.D. at 255-56.

The Department's initial program regulations "apply to operations * * * on lands from which the coal has not yet been removed and to any other lands used, disturbed, or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or these regulations." 30 CFR 710.11(d)(1) (emphasis added). The initial regulations do not define "disturbed," but the term "disturbed area" is defined at 30 CFR 710.5 to mean "those lands that have been affected by surface coal mining and reclamation operations." In Cedar Coal, the Board rejected OSM's argument that based upon this definition the terms "disturbed" and "affected" are synonymous, and "that since Cedar 'affected' the orphaned highwall by 'touching' it, the company must eliminate the entire highwall." 1 IBSMA at 155, 86 I.D. at 255. Thus, an area may be "affected" by surface coal mining activities without being "disturbed." The Board ruled that to be subject to SMCRA and the regulations during the initial program, the area in question must have been "disturbed," *i.e.*, the operator has to engage in activities which have an "adverse physical impact" on that area.

The term "adverse physical impact" is not defined in the interim program regulations. ^{6/} The Board in Cedar Coal did not define the term, but ruled that Cedar's operations did not result in an adverse physical impact. Petitioners argue that under the Cedar Coal rationale, as extended by Darmac Coal Co., 74 IBLA 100 (1983), they are excused from the backfilling and grading requirements of 30 CFR 715.14, since their remining operations did not result in an adverse physical impact upon the permit area. See Mountain Enterprises Coal Co., 3 IBSMA 338, 88 I.D. 861 (1981) (orphan highwall subject to adverse physical impact). In Darmac Coal, supra, the Board addressed the issue of whether Darmac by disturbing a previously mined area became responsible for passing all surface water from the area through a sedimentation pond and meeting the applicable effluent standards. The Board ruled that there had been no showing that Darmac's operations caused an adverse physical impact requiring it to bring a preexisting water quality violation into compliance with 30 CFR 715.17(a). The Board stated: "It has been held in a context also involving previously mined areas that absent adverse physical impact from the current mining on the condition remaining from the previous mining -- in those cases, orphaned highwalls -- no disturbance occurs that requires bringing that condition into compliance with presently applicable standards." 74 IBLA at 104. The Board ruled that there had been no showing that Darmac's operations caused an adverse physical impact requiring it to bring the water quality violation into compliance with 30 CFR 715.17(a).

^{6/} We note that the permanent program regulations do provide a definition of the term, relating it specifically to the highwall situation.

"Adverse physical impact means, with respect to a highwall created or impacted by remining, conditions, such as sloughing of material, subsidence, instability, or increased erosion of highwalls, which occur or can reasonably be expected to occur as a result of remining and which pose threats to property, public health, safety, or the environment." 30 CFR 701.5.

Our application of the Cedar Coal rationale is of no benefit to petitioners in this case, since the evidence establishes that their operations had an adverse physical impact upon the portions of the permit area subject to the OSM enforcement action. The violation was issued for the area of "graded outcrops on the southern end of the disturbed area with a slope measurement of approximately 28-29 degrees (Cts [cuts] No. 1 and 2)" (Exh. R-5). While Godesky did not see any ongoing coal extraction by petitioners, on a June 14, 1979, visit to the site he observed earth moving equipment placing spoil along the slopes which he later referred to in the NOV (Tr. 8-9). On June 20, 1979, he observed that the entire southern portion of the minesite from its eastern to western limits was barren of vegetation and had been recently disturbed by mining equipment regrading spoil. He saw reclamation activity occurring on the southern end of the disturbed area where the company was modifying the outslope which he later cited (Tr. 9-12, 34, 72, 73, 81, 104; Exh. R-1, R-12). His later inspection in 1984 disclosed continued erosion and further dying off of vegetation (Tr. 67, 68).

During the mining operations on the site, Excello used the bench area of a preexisting highwall on which to store spoil material. The highwall was located north of the outcrops cited by OSM in the NOV (Exh. R-12, A-3 at 3). Prior to mining, the premining slope ran from the top of the highwall to the crest of the minesite area with an average slope of 15 degrees and no negative slopes. (Exh. A-3 at 3). While reclaiming the area, Excello backfilled the bench area of the highwall with spoil material and completely eliminated the highwall. However, in doing so Excello created a slope which begins to rise from the perimeter of the backfilled area at an angle of 26 degrees

until it reaches a high point approximately 50 to 75 lateral feet north where it falls in a negative slope for approximately 100 to 125 lateral feet before rising to the crown of the minesite (Exh. R-47 at 2). The negative slope, in combination with a positive slope lying to the north of the orphaned highwall area, created a trough in the disturbed area. The troughing effect resulted in rills and gullies being created by erosion, as is evidenced by Exhibits R-12, 32, 33, and 34. Petitioners created another area of severe erosion on the southern tip of the disturbed area, where the spoil pile slopes equaled 26 to 29 degrees, as is seen on Exhibits R-6, 7, 12, and 33.

This record makes clear that areas cited by OSM in issuing the NOV and CO were "disturbed" by petitioners in conducting their operations within the rationale of Cedar Coal, since their operations resulted in an "adverse physical impact." Accordingly, Judge Torbett properly sustained OSM's CO for failure to meet the requirements of 30 CFR 715.14(b) and the permit conditions based thereon. ^{7/}

[3] Petitioners argue that Judge Torbett should have granted their motion to dismiss the CO on the basis that OSM did not issue the notice of proposed penalty until about 6 months after the CO was written. They state that "[t]his conduct on the part of [OSM] clearly flies in the face of the requirement of 30 C.F.R. § 723.17(b) which require that [OSM] shall serve a copy of a proposed assessment within thirty (30) days of the issuance of an NOV or CO" (Petitioners' Brief at 16). Before the assessment conference was

^{7/} Judge Torbett did not discuss the Cedar Coal line of cases; rather he applied 30 CFR 715.14 without reference to whether petitioners' operations resulted in an adverse physical impact on the previously mined area.

held, there was a fire at the offices of Excello in Grundy, Virginia, which, according to petitioners "destroyed maps, photographs and other documents which were vital to the [petitioners] having a fair and full hearing before the assessment conference officer (and the ALJ)." Id. at 17. Those materials "would have been invaluable in helping to irrefutably establish facts concerning the prior condition of the slopes and the total lack of adverse physical impact upon the subject slopes." Id.

Judge Torbett rejected petitioners' argument that OSM's delay in issuing the notice of proposed assessment prejudiced their position. He applied Badger Coal Co., 2 IBSMA 147, 87 I.D. 319 (1980), in which the Board addressed the question of whether OSM's failure to hold an informal assessment conference within 60 days after a request "should result in the vacation of both a notice of violation or cessation order and the resulting civil penalty." 2 IBSMA at 151, 87 I.D. at 321. The Board reasoned as follows:

If OSM fails to hold a conference within 60 days, and if the person assessed a civil penalty timely objects to this failure and can prove actual prejudice, some relief may be appropriate. * * * [A]n Administrative Law Judge should be free to exercise discretion in fashioning appropriate relief for failure to hold the conference within 60 days. However, the relief must address the prejudice shown. Therefore, appropriate relief would not include vacating a notice of violation or cessation order. It might be appropriate to reduce the civil penalty, but except in rare circumstances it seems unlikely that sufficient prejudice could be shown to justify vacating it.

2 IBSMA at 152, 87 I.D. at 321-22.

While Judge Torbett found that petitioners made a timely objection to OSM's delay in issuing the notice of proposed assessment, he ~~held that~~ Id. at 17.

argument that they had shown "actual prejudice." He found that "[w]hile the maps and photographs in the burned Excella office may have helped to show the premining contour of the site, the evidence in that office could not change the permit conditions" (ALJ Decision at 7). He resolved the question of whether the violation underlying the CO occurred on the basis of the permit package filed by Bernos. 8/

Petitioners also argue that OSM's failure to respond to their motion to dismiss should be construed as a waiver of objection to the motion. Regulation 43 CFR 4.1112(b) provides that "any party to a proceeding in which a motion is filed * * * shall have 15 days from service of the motion to file a statement in response." OSM counters that 43 CFR 4.1112(c) does not mandate that a failure to file a statement in response under subsection (b) be construed as a waiver of objection. Rather, "[F]ailure to make a timely motion or to file a statement in response may be construed as a waiver of objection." 43 CFR 4.1112(c) (emphasis added). OSM cites the preamble to 43 CFR 4.1112(c), which explains that suggestions that the waiver be mandatory were rejected by the Department as unduly harsh. 43 FR 34378 (Aug. 3, 1978). OSM points out that petitioners made no mention of their motion at the hearing, and it "was not resurrected by [petitioners] until [they] filed [their] post hearing brief" (OSM's Brief in Response at 10). We conclude that Judge Torbett correctly denied petitioners' motion to dismiss.

8/ We find merit in OSM's contention that "all the necessary documents and photographs were available to [petitioner] from other sources, and it failed to show any effort to obtain replacement records. Excella could have acquired the records from Bernos or its prior counsel, or the engineering company that prepared the permit package" (OSM's Brief in Response at 12; footnote omitted).

[4] Judge Torbett ruled that the \$ 22,500 civil penalty should be assessed against Bernos only, and not against Excello. He stated that "[t]he liability of Excello must be determined by its factual relationship with Bernos" (ALJ Decision at 7). He noted the following facts:

Bernos is the permittee, not Excello (Ex. A-3). The record shows that Excello was in complete charge of the operation of the subject mine. According to Mr. Powers, [Roger Powers, President of Excello] Excello leased the minesite from Bernos (Tr. 131), extracted coal from the site (Tr. 141), and performed all the reclamation work on the site (Tr. 142).

(ALJ Decision at 7). OSM argues that Judge Torbett erred and that liability for the civil penalty should extend to Excello also.

In reply, petitioners argue that OSM's attempt to have Judge Torbett's ruling reviewed should be dismissed. Petitioners claim that OSM issued the penalty assessment only to Bernos and that Excello prepaid the penalty in accordance with contractual obligations existing between Bernos and Excello. Petitioners claim liability was never an issue; it was not raised at the hearing or in the posthearing briefs. Petitioners register surprise that Judge Torbett made a ruling thereon. They claim that since liability was not an issue, the question was moot and any ruling by the Board would constitute nothing more than an advisory opinion, citing 5 CJS Appeal and Error § 1354(1) (1958).

Petitioners are correct that liability for the civil penalty in this case was never at issue. The total amount of the civil penalty was prepaid 97 IBLA 312

prior to the hearing. Neither party requested a ruling from the Administrative Law Judge on liability for the penalty. We find that any question of liability was moot. There was no reason for such a ruling. Therefore, that part of Judge Torbett's decision relating to liability is vacated and OSM's Petition for Discretionary Review is dismissed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm as modified that part of Judge Torbett's decision ruling that the doctrines of res judicata and collateral estoppel do not bar OSM's enforcement action in this case; we affirm that part of the decision ruling that OSM's issuance of the CO was proper and that part of the decision denying petitioners' motion to dismiss; we vacate that part of the decision regarding liability for the civil penalty and dismiss OSM's Petition for Discretionary Review of that ruling.

Bruce R. Harris
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member.